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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN GUTIERREZ,

Defendant and Appellant.

B238329

(Los Angeles County
Super. Ct. No. TA116464)

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul A. Bacigalupo, Judge. Affirmed and remanded with directions.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Lawrence M. Daniels and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jonathan Gutierrez appeals from the judgment entered following his conviction of three counts of second degree robbery (Pen. Code,¹ § 211), with true findings on the gang enhancements alleged as to each count (§ 186.22, subd. (b)(1)). On appeal, Gutierrez argues that the evidence was insufficient to support the jury's findings that each of the robberies was committed for the benefit of, at the direction of, or in association with a gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members. Gutierrez also asserts that the trial court erred in imposing an additional term on a personal use of a firearm enhancement alleged as to one of the robbery counts when the jury specifically found that enhancement allegation to be not true. We remand the matter to the trial court for resentencing, but otherwise affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Charged Crimes

In an amended information, the Los Angeles County District Attorney charged Gutierrez with the second degree robberies of Juan Parada (count 1), John Liu (count 2), and Matias Sanchez (count 3). As to count 1, it was alleged that Gutierrez personally inflicted great bodily injury on Parada during the commission of the robbery (§ 12022.7, subd. (a)). As to count 2, it was alleged that Gutierrez committed the robbery of Liu against a victim who was over the age of 60 (§ 1203.09, subd. (f)). As to counts 2 and 3, it was alleged that a principal was armed with and personally used a firearm during the commission of the robberies of Liu and Sanchez (§§ 12022, subd. (a)(1), 12022.53, subds. (b), (e)(1)). As to all three counts, it was alleged that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)). Gutierrez pleaded not guilty to each count and denied

¹ All further statutory references are to the Penal Code.

the enhancement allegations. Prior to trial, the court granted Gutierrez's motion to bifurcate trial of the gang enhancement allegations from trial of the underlying charges.

II. Trial of the Underlying Charges

A. Robbery of Juan Parada (Count 1)

On January 17, 2011, at approximately 3:00 p.m., Parada was walking home from the train station near the Imperial Courts housing projects. After Parada turned onto Grape Street, Gutierrez and another unidentified man grabbed Parada from behind and threw him to the ground. Both men proceeded to punch and kick Parada repeatedly in his head and ribs. They called Parada a "fucking Latino" as they beat him. Gutierrez took Parada's wallet, which contained about \$400 in cash and his identification card. Gutierrez then ran into the housing projects while the other man ran into an alley. At the time of the robbery, Gutierrez was wearing a bluish striped shirt over a white t-shirt and the other man was wearing both a black t-shirt and a white t-shirt with jeans. Parada suffered a dislocated jaw and a painful head injury during the assault.

Shortly after the robbery, a patrol car responded to the scene. Parada provided a description of his attackers to the police, but did not mention any tattoos or other markings on their persons. Less than two weeks later, Parada identified Gutierrez in a six-pack photographic lineup shown to him by the police. At a preliminary hearing in July 2011 and at trial in November 2011, Parada made in-court identifications of Gutierrez as one of the men who robbed and assaulted him.

At the preliminary hearing, Parada testified that he did not notice any tattoos or markings on the face of either attacker. At trial, however, Parada provided conflicting testimony on this issue. While he initially denied seeing any tattoos on Gutierrez's face during the attack, he later stated that he did observe a distinct tattoo below Gutierrez's right eye as he was being beaten. He indicated that he had not described the tattoo to anyone prior to trial, including the police, because of "a lot of fear," but he was unable to articulate what about the tattoo made him feel afraid. Parada never testified that he associated the tattoo on Gutierrez's face with a gang.

B. Robberies of John Liu and Matias Sanchez (Counts 2-3)

On January 25, 2011, at approximately 9:30 a.m., Liu and Sanchez were performing electrical work at a house on Grape Street. The house was directly across the street from the Imperial Courts housing projects and approximately one block from the location where Parada was attacked. Liu was working inside the attic of the house as Sanchez stood on a ladder leading into the attic. Gutierrez and another unidentified man walked into the house and asked Sanchez for permission to retrieve something from the backyard. When Sanchez stepped off the ladder and went to the back door, Gutierrez pointed a gun at him and told Sanchez to give him all of his money. Sanchez complied and handed Gutierrez \$150 in cash. Gutierrez then handed the gun to his companion, climbed the ladder to the attic, and told Liu to give him all of his money. Upon hearing Sanchez say that the men had a gun, Liu handed Gutierrez his wallet, which contained \$100 in cash. After taking the money, Gutierrez and the other man walked out of the house through the back door. At the time of the robbery, both Gutierrez and his companion were similarly dressed in a gray or white hooded sweatshirt and pants.

Immediately after the robbery, Sanchez called the police. In describing the perpetrators to the responding officers, both Sanchez and Liu noted that the man who demanded their money had a tattoo below his right eye. Sanchez described the tattoo as a line in the shape of the letter "S." Liu described the tattoo at trial as resembling a butterfly. Neither victim referred to the tattoo as being gang-related.

Later that day, the police drove Sanchez to a field show-up inside the housing projects where Gutierrez had been detained. Sanchez, who was seated in the back of a patrol car about 50 feet away, was unable to make a positive identification at that time. The following day, Liu identified Gutierrez in a six-pack photographic lineup shown to him by the police. Sanchez also was shown a six-pack lineup that included Gutierrez's photograph, but did not identify anyone. At the preliminary hearing in July 2011 and at trial in November 2011, both Sanchez and Liu made in-court identifications of Gutierrez as one of the men who robbed them.

Gutierrez was arrested inside the housing projects on January 26, 2011. His accomplice in the robberies was never identified.

III. Trial of the Gang Enhancement Allegations

Los Angeles Police Officer Francis Coughlin testified as a gang expert for the prosecution. He had been assigned to the Southeast Division for approximately 14 years where he was responsible for monitoring certain housing development gangs, including the PJ Watts Crips gang. The PJ Watts Crips were a predominately African-American gang with 600 to 800 documented members, including 200 active members. The gang's claimed territory consisted of the area in and around the Imperial Courts Housing Development with the heart of its territory being inside the development itself. Each of the robberies in this case was committed in the territory claimed by the gang. The gang associated itself with the color blue and with the letters "PJ" which stood for "projects." The primary activities of the gang included vandalism, robbery, carjacking, assault, rape, firearm possession, and narcotics sales. In committing crimes, the gang mostly targeted innocent Hispanic members of the community rather than rival gang members. Specific crimes committed by active members of the PJ Watts Crips included possession of a firearm by a felon in September 2008 and second degree robbery in August 2011.

Officer Coughlin was familiar with Gutierrez based on his review of the field identification cards completed by other gang officers. Between May 2007 and January 2011, Gutierrez had seven documented contacts with gang officers in which he admitted to being a member of the PJ Watts Crips with the monikers "Jaca" and "Little Scooby." The two most recent contacts occurred shortly before 2:00 p.m. on January 25, 2011, approximately five hours after the robberies of Liu and Sanchez. Gutierrez was observed in the area of 115th Street and Grape Street in the gang's territory associating with other known gang members. He admitted to officers at that time that he was still an active member of the PJ Watts Crips.

At the time of his arrest, Gutierrez had numerous gang-related tattoos, including the letters "PJ" under his right eye, the words "fast cash" under one ear, the letter "P" on

his right arm, the letter “J” on his left arm, the letters “PJWC” on his right hand, and the numbers “115” on his left hand. According to Officer Coughlin, the face tattoos showed a strong affiliation with the PJ Watts Crips and a willingness to commit crimes for the gang. As Officer Coughlin described, “when you put a tattoo of your gang on your face, other gang members hold you accountable for that tattoo. . . . [I]f he does not put in the work, he’ll be what they call ‘disciplined’ by that gang because he’d be considered a poser or someone who is not down for his hood, who is taking the credit of the neighborhood and showing it off on his face, but not willing to put in the work.” The tattoo of the words “fast cash” reflected a willingness to commit crimes that could lead to instant money like robbery and carjacking. Officer Coughlin explained that it was significant that Gutierrez’s tattoos could not be easily covered up because it showed “how brazen he is” and “how much he wants others to know that he’s a member of this gang.” While the tattoos would make Gutierrez more identifiable to crime witnesses, “it’s letting the community know that, hey, I know you see this. I don’t care. I’m going to do this anyway, because if you come and testify, there’s a price to be paid.”

When presented with a series of hypothetical questions rooted in the facts of the case, Officer Coughlin opined that each of the robberies was committed for the benefit of and in association with the PJ Watts Crips gang. Officer Coughlin testified that the crimes would benefit the gang by instilling fear in the surrounding community which would make its residents less likely to report future crimes committed by the gang, and by providing the gang with monetary profits which could then be used to purchase drugs for resale and guns for use against rival gang members. The crimes also would benefit Gutierrez directly by enhancing his reputation within the gang, which in turn would make it easier for Gutierrez to commit future crimes for the gang’s benefit.

On cross-examination, Officer Coughlin admitted that a gang member who commits a crime in gang territory does not necessarily commit the crime for the benefit of his or her gang. He also acknowledged that a gang member at times may commit a crime in gang territory for his or her own personal gain. However, Officer Coughlin opined that, in this case, the PJ Watts Crips so tightly controlled the area in and around

the housing projects that the gang would not allow robberies to occur in its territory unless those crimes benefited the gang. As Officer Coughlin stated, “[t]he gang doesn’t let people rob people if they’re not affiliated to the gang. That’s why it’s kept in-house. So if I wanted to rob someone and I lived in Imperial Courts and I didn’t want to be a gang member, I’d better stand by, because they’re probably going to come get me and the property that I took. And that’s the control that they have in these developments.” Additionally, because a PJ Watts Crips gang member who committed a crime in the gang’s territory would bring an unwanted police presence into the area, the gang member would have to be accountable for that crime to the gang. As Officer Coughlin explained, if a gang member who robs, steals, or sells drugs “keeps the money all to himself and it’s bringing police presence into the neighborhood, that’s not going to fly with the gang, because there’s a certain amount of accountability amongst gangsters. So if somebody is out doing a bunch of street robberies on their own, keeping all the profits, they’re going to have to answer to that gang.”

Officer Coughlin further testified that, due to the dynamics of the area controlled by the PJ Watts Crips, a gang member who committed a robbery with another person in or around the Imperial Courts Housing Development had “the freedom of knowing certain things. They know they’re not going to be stopped because it’s his gang that’s watching out. They know they have a place to run. They can run inside their development and seek refuge in their friends’ houses, and they also have the understanding of knowing that if things do turn difficult, other members of the gang who aren’t even participating in the crime may come to their aid. . . . And that’s why so many robberies are committed by the Project Crips in this neighborhood, not by other gangs. That’s how they create that atmosphere and intimidation.” According to Officer Coughlin, over 90 percent of the crimes committed inside the housing development were gang-related.

Officer Coughlin admitted that he was speculating that Gutierrez’s accomplice in the robberies was a gang member, but explained that, in his experience as a gang officer, PJ Watts Crips gang members only committed crimes with other members of that gang.

Officer Coughlin also admitted that he had no personal knowledge that any of the proceeds from the robberies went to the gang, that the gang was made aware that Gutierrez was one of the perpetrators, or that Gutierrez's reputation in the gang was enhanced by his participation in the crimes. In addition, Officer Coughlin acknowledged that there were no known witnesses to the robberies other than the three victims and that none of the victims associated Gutierrez's tattoos with a gang or was aware that Gutierrez was affiliated with a gang. However, Officer Coughlin testified that it was not necessary that the victims in this case actually knew that Gutierrez was a gang member because "when a gang member robs or terrorizes a victim, the implications are felt throughout the development in the community."

IV. Verdict and Sentencing

At the conclusion of the trial on the underlying charges, the jury found Gutierrez guilty of the second degree robberies of Parada, Liu, and Sanchez. In addition, the jury made true findings on the great bodily injury enhancement alleged as to the robbery of Parada (§ 12022.7, subd. (a)), the elderly victim enhancement alleged as to the robbery of Liu (§ 1203.09, subd. (f)), and the principal armed with a firearm enhancements alleged as to the robberies of Liu and Sanchez (§ 12022, subd. (a)(1)). The jury also made a true finding on the personal use of a firearm enhancement alleged as to the robbery of Sanchez, but not on the same enhancement alleged as to the robbery of Liu (§ 12022.53, subds. (b), (e)(1)). At the conclusion of the bifurcated trial on the gang enhancement allegations, the jury made true findings on each of the three gang enhancements alleged (§ 186.22, subd. (b)(1)).

The trial court sentenced Gutierrez to a total term of 34 years and eight months in state prison. As to the robbery of Sanchez (count 3), the court selected it as the base count, and imposed a term of five years on the robbery count, 10 years on the personal use of a firearm enhancement (§ 12022.53, subd. (b)), and 10 years on the gang enhancement (§ 186.22, subd. (b)(1)). As to the robbery of Liu (count 2), the court imposed a consecutive term of one year on the robbery count, three years and four

months on the personal use of a firearm enhancement (§ 12022.53, subd. (b)), and a stayed term of three years and four months on the gang enhancement (§ 186.22, subd. (b)(1)). As to the robbery of Parada (count 1), the court imposed a consecutive term of one year on the robbery count, one year on the great bodily injury enhancement (§ 12022.7, subd. (a)), and three years and four months on the gang enhancement (§ 186.22, subd. (b)(1)). Following his sentencing, Gutierrez filed a timely notice of appeal.

DISCUSSION

I. Sufficiency of the Evidence on the Gang Enhancements

On appeal, Gutierrez challenges the sufficiency of the evidence supporting the jury's true findings on the gang enhancements alleged as to each of the robbery counts. He specifically contends that the evidence was insufficient to support the jury's findings that he committed the robberies for the benefit of, at the direction of, or in association with a gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members. Gutierrez reasons that, apart from the evidence that he committed the robberies in his gang's claimed territory, there were no particularized facts to support the gang expert's opinion that Gutierrez acted with a specific intent to benefit or promote the interests of his gang. Considering the totality of the evidence in this case, however, we conclude that the gang enhancements were supported by substantial evidence.

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] ‘A reviewing court neither

reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

The California Street Terrorism Enforcement and Prevention Act was enacted by the Legislature with the express purpose "to seek the eradication of criminal activity by street gangs." (§ 186.21.) One component of the statute is a sentence enhancement provision for felonies committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) As the California Supreme Court has observed, section 186.22 "does not criminalize mere gang membership; rather, it imposes increased criminal penalties only when the criminal conduct is felonious and committed not only 'for the benefit of, at the direction of, or in association with' . . . a 'criminal street gang,' but also with the 'specific intent to promote, further, or assist in any criminal conduct by gang members.' [Citation.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624.) The sentence enhancement accordingly applies "only if the crime is 'gang related.'" (*Id.* at p. 622.)

"It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach . . . a finding on a gang allegation. [Citation.]" (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) "'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]'" (*People v. Ward* (2005) 36 Cal.4th 186, 209.) While a gang expert may not ordinarily testify whether the defendant committed a particular crime for the benefit of a gang, the expert "properly could . . . express an opinion, based on hypothetical questions that tracked the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) Indeed, "'[e]xpert opinion that particular criminal conduct benefited a gang" is not only permissible but can be sufficient to support the . . . section 186.22, subdivision (b)(1), gang enhancement. [Citation.]" (*Ibid.*)

Gutierrez argues that each of the gang enhancements must be reversed because, other than Officer Coughlin's generalized opinion that almost any crime committed by a gang member in gang territory would be for the benefit of a gang, there was no evidence that the robberies committed in this case were gang-related. As Gutierrez points out, the prosecution did not present any evidence that his accomplice in the robberies was a gang member. Nor was there any evidence that either Gutierrez or his accomplice displayed any gang signs, called out any gang names, or otherwise announced their gang affiliation during their commission of the crimes. In addition, Officer Coughlin admitted that he had no personal knowledge that any of the proceeds from the robberies was distributed to Gutierrez's gang, that Gutierrez's participation in the robberies was communicated to his fellow gang members, or that his gang's connection to the crimes was circulated within the surrounding community. Gutierrez thus reasons that Officer Coughlin's explanation as to how the robberies might have benefited the gang was based solely on speculation, not on any facts shown by the evidence.

A thorough review of the record, however, reflects that Officer Coughlin's expert testimony was supported by substantial evidence connecting Gutierrez's crimes to his gang. First, each of the robberies was committed in the PJ Watts Crips' claimed territory in very close proximity to the Imperial Courts Housing Development. The robberies of Liu and Sanchez occurred directly across the street from the development, and the robbery of Parada occurred approximately one block away. Immediately following the robbery of Parada, Gutierrez fled into the development itself. As described by Officer Coughlin, the housing development was in the heart of the territory claimed by the PJ Watts Crips and was subject to strict control by the gang. Approximately 90 percent of crimes committed in the development were gang-related and the gang's targeted victims were mostly innocent Hispanic residents rather than rival gang members. Officer Coughlin further testified that a PJ Watts Crips gang member who committed a crime could seek refuge inside the development and rely on the protection afforded by his fellow gang members who resided there. Notably, when Gutierrez was detained a few hours after the second robbery, he was inside the development and in the company of

other PJ Watts Crips gang members. From this evidence, the jury reasonably could have inferred that Gutierrez acted in association with the PJ Watts Crips by targeting his victims based on their close proximity to his gang's stronghold and the safe refuge that it provided to its members.

Second, at the time of the robberies, Gutierrez had a number of visible gang tattoos on his face, arms, and hands. The tattoos included the letters "PJ" below one eye and the words "fast cash" below one ear. Each of the victims testified that they saw a distinct tattoo below Gutierrez's right eye during the robberies. Although it is true that none of the victims directly associated the tattoo with a gang in their testimony, Parada admitted that he never disclosed this identifying feature to the police because of fear. Consistent with this evidence, Officer Coughlin explained that prominent gang tattoos on a gang member's face were a form of intimidation. In addition to showing a strong affiliation with a gang, such visible tattoos were intended to communicate to crime victims and witnesses that the gang member was not concerned about being identified and that there was "a price to be paid" if the crime was reported to the police. Therefore, while the victims in this case may not have realized that Gutierrez's tattoos were gang-related, the jury reasonably could have inferred that Gutierrez intended to make his membership in a gang known to his victims through his prominent gang tattoos.

Third, Officer Coughlin testified that the PJ Watts Crips gang so tightly controlled the profit-based crimes in its claimed territory that it would not allow such crimes to be committed by its members unless they benefited the gang. Officer Coughlin explained that the PJ Watts Crips were unique in the level of control that they exerted over the area in and around the Imperial Courts Housing Development. Because the commission of a crime by a PJ Watts Crips gang member would bring an unwanted police presence into the area, the gang would discipline the perpetrator and refuse to provide him or her with protection if the crime did not benefit the gang. With respect to the specific benefits received by the gang, Officer Coughlin testified that the PJ Watts Crips used the proceeds from the robberies committed by its members to fund other criminal activities, such as the purchase of drugs for resale and firearms for use against rival gangs. The PJ Watts

Crips also used the violent nature of the robberies to instill fear in the surrounding community, which would facilitate the commission of future crimes by the members of the gang. (See e.g., *People v. Albillar*, *supra*, 51 Cal.4th at p. 63 [“[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’”]; *People v. Gardeley*, *supra*, 14 Cal.4th at p. 619 [based on expert testimony that a gang relied on violent assaults to frighten residents, “the jury could reasonably conclude that the attack on [the victim] . . . was committed ‘for the benefit of, at the direction of, or in association with’ that gang”].)

It is true that Officer Coughlin lacked personal knowledge that Gutierrez shared any of the proceeds from the robberies with his fellow gang members, or that either Gutierrez or his gang claimed responsibility for the robberies to enhance their reputations in the community. However, contrary to Gutierrez’s contention, there was other evidence supporting Officer Coughlin’s expert opinion that the crimes were intended to benefit and further the interests of the gang. Eight days after Gutierrez robbed and brutally assaulted Parada in broad daylight on a public street, he robbed Liu and Sanchez at gunpoint only a block away from his prior crime. Gutierrez fled into the housing development immediately after the first robbery, and was observed inside the development associating with fellow gang members shortly after the second robbery. Such evidence reasonably could support an inference that Gutierrez was never disciplined by his gang for acting for his own personal benefit, but rather was allowed to continue committing robberies in his gang’s territory for the broader benefit of his gang.

For these reasons, the cases on which Gutierrez relies, including *In re Daniel C.* (2011) 195 Cal.App.4th 1350, *People v. Ochoa* (2009) 179 Cal.App.4th 650, *People v. Ramon* (2009) 175 Cal.App.4th 843, and *In re Frank S.* (2006) 141 Cal.App.4th 1192, do not support a reversal of the gang enhancements in this case. None of those prior decisions included the specific factual scenario present here – a gang member displaying prominent gang-related tattoos commits a series of robberies in his gang’s tightly controlled territory, and upon completion of the crimes, is observed in his gang’s

stronghold associating with other gang members. Based on the totality of the evidence, the jury reasonably could have found that Gutierrez committed each of the robberies for the benefit of, at the direction of, or in association with the PJ Watts Crips, and with the specific intent to promote, further, or assist in criminal conduct by his gang. The jury's true findings on the gang enhancements were supported by substantial evidence.

II. Sentencing Error

Gutierrez contends, and the Attorney General concedes, that the trial court erred in imposing a section 12022.53, subdivision (b) firearm enhancement on Count 2 because the jury specifically found that enhancement allegation to be not true. We agree. As to Count 2, the robbery of Liu, there were two firearm enhancements alleged. Although the jury made a true finding that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1), it found the allegation that Gutierrez personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1) to be “not true.”² However, at the sentencing hearing, the trial court erroneously imposed a consecutive term of three years and four months on Count 2, a subordinate count, under section 12022.53, subdivision (b). The section 12022.53, subdivision (b) enhancement must therefore be vacated.

As Gutierrez acknowledges, because the jury made a true finding on the firearm enhancement alleged under section 12022, subdivision (a)(1), he may be subject to an additional term as to Count 2 based on this separate enhancement. Consequently, we remand the matter to the trial court for resentencing on Count 2 in light of the jury's true finding on the firearm enhancement alleged under section 12022, subdivision (a)(1) and “not true” finding on the firearm enhancement alleged under section 12022.53,

² In its verdict form, the jury was not asked to make any finding as to whether a principal other than Gutierrez personally used or discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c), (d), or (e)(1).

subdivisions (b) and (e)(1), as well as the court's discretion to reconsider the propriety of the stay of the gang enhancement.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for resentencing on Count 2 in accordance with the jury's true finding on the firearm enhancement alleged under section 12022, subdivision (a)(1) and "not true" finding on the firearm enhancement alleged under section 12022.53, subdivisions (b) and (e)(1).

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.